No. 71-874

Supreme Court of the United States

OCTOBER TERM 1971

Supreme Court, U.S.
FILED

DANIEL MICHAEL FELTMAN
Petitioner

VERSUS

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

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No.

Supreme Court of the United States

OCTOBER TERM 1971

DANIEL MICHAEL FELTMAN
Petitioner

VERSUS

UNITED STATES OF AMERICA
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

OPINIONS BELOW

The opinion reported below in this cause by the United States Court of Appeals, Tenth Circuit, was filed October 22, 1971, styled: United States of America, Appellee, v. Daniel Michael Feltman, Appellant, Case No. 71-1048. The opinion appears at Page 19 of the Appendix hereof.

The Order of the Court of Appeals denying rehearing was entered December 1, 1971. Appendix, Page 24.

JURISDICTION

This cause originated in the United States District

Court for the Western District of Oklahoma as a prosecution for violation of 18 U.S.C. 2314. The appeal was taken from the Order entered therein December 9, 1970, (see Appendix, Page 16), whereupon the defendant's presentencing Motion to Withdraw Plea of Nolo Contendre was overruled and denied and Judgment and Commitment thereupon entered and filed December 9, 1970 (Appendix, Page 18).

The United States Court of Appeals, Tenth Circuit, entered and filed its opinion affirming the District Court on October 22, 1971. The Court of Appeals entered and filed its summary order denying rehearing on December 1, 1971.

No extension of time within which to petition for certiorari has been sought nor granted.

The defendant, however, was enlarged on bail upon his application to the District Court December 14, 1970, and on December 13, 1971. The Court of Appeals entered and filed its order staying issuance of the mandate pending filing of this Petition by December 31, 1971.

The statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment and order in question by certiorari is *28 U.S.C. 1254(1).*

QUESTIONS PRESENTED

The central question presented herein is:

Was it abuse of judicial discretion on the part of the

District Court, amounting to denial of due process, to deny the appellant's Motion to Withdraw His Plea of Nolo Contendre? In the determination of this question the following circumstances, and subsidiary questions raised thereby, are submitted as material:

1. Appellant's Motion to Withdraw His Plea of Nolo Contendre was filed forthwith upon his employment of present counsel, on December 4, 1970, and five days prior to the scheduled appearance for sentencing. This motion alleged that appellant was not in fact guilty, and that his former plea of nolo contendre had been induced by insinuations that his cooperation, which had in fact been rendered, would be rewarded by leniancy, made to him by an agent of the Federal Bureau of Investigation.

The subsidiary question presented hereby is: Should not the rule followed in the Second, Third, Fifth, Ninth, and District of Columbia Circuits, "a presentence motion to withdraw a guilty plea should be freely allowed" be uniformly followed? Cases following such rule are:

Second Circuit — *United States v. Rogers*, (1968, DC Conn) 289 F. Supp. 726.

Third Circuit — *United States v. Stayton*, (1969, CA3 Pa) 408 F. 2d 559.

United States v. Boyance, (1966, DC Pa) 258 F. Supp. 935; *United States v. Fina*, (1968, DC Pa) 289 F. Supp. 288.

Fifth Circuit — *United States v. Tivis*, (1969, DC Tex.) 302 F. Supp. 581, affd. (CA5) 421 F. 2d 147.

Ninth Circuit — *Kadwell v. United States*, (1963, CA9 Nev.) 315 F. 2d 667; *United States v. Thomas*, (1969, CA9 Cal.) 415 F. 2d 1216.

Dist. Col. Circuit — *Poole v. United States*, (1957) 102 App. DC 71, 250 F. 2d 396; *Gearhart v. United States*, (1959) 106 App. DC 270, 272 F. 2d 499.

2. At hearing upon appellant's Motion to Withdraw Plea of Nolo Contendre, had December 9, 1970, appellant stated that he believed that he had a valid defense to the charges, and through his testimony and argument of counsel the District Court was apprised fully of the particulars of this defense, which was:

(a) That although appellant admitted performance of the physical acts alleged as part of the offense he interposed (1) that he lacked intent to defraud, (2) that prior to the transmission of the check subject of the charge against him, appellant voluntarily made full disclosure of the transaction, so that thereafter the transmission of the check, if any, became the independent act of the Oklahoma City Police and the depository bank, as in *United States v. Gardner*, (Dec. 20, 1948, CA 7th Circ.) 171 F. 2d 753.

3. Manifestly, the trial court and the Court of Appeals based their decision upon the following questions and answers at the December 9 proceedings:

"THE DEFENDANT: Yes, sir, I told my father and my lawyer at the time that I didn't want to

enter this nolo contendere plea, but wanted to enter a not guilty, and they told me to go ahead.

THE COURT: You had already done that, you had already pled not guilty when this happened.

THE DEFENDANT: Yes, sir. They told me — they told me I was coming in to change my plea. I told them I wanted to stay with the not guilty plea, and that I wasn't guilty of the crime, and my dad and my lawyer both told me to go ahead, that — that the — they was led to believe, also, that I was going — had a good chance for probation.

THE COURT: Well, let me ask again: Why did you tell me, then, that you did commit the crime? And I am going to ask another question in a moment. How come you to tell me there that day that you did commit this crime?

THE DEFENDANT: Well, in that — actually, I did commit the crime."

Transcript, Page 34

However, this should be considered in relation to the following two attempts by the trial court to explain the nature of the charges to the appellant:

At arraignment, October 29, 1970, the following transpired:

"Q: And, finally, I must inquire, did you commit the offense with which you are charged, that is, did you, along with your wife, cause this $1200 check, which was forged, to be transported in interstate commerce, that is from Oklahoma City to the Houiston bank on which it was drawn?

A: Yes, sir, I did." Transcript, Page 15

And the trial court reiterated the same description of the offense again on December 9, 1970, in cross-examining the appellant:

> "THE COURT: . . . that is, did you, along with your wife, cause this $1200 check, which was forged, to be transported in interstate commerce, that is, from Oklahoma City to the Houston bank on which it was drawn? Your answer, Yes, sir, I did."
>
> Transcript, Page 33

The subsidiary question presented hereby: Is not the Court, in the exercise of sound judicial discretion, required to consider the testimony within its four corners to determine its reasonable import, rather than to place reliance on one inculpatory response made by a nervous 20-year-old defendant, responsive to a question of the Court *which omitted the exact material element of the offense denied by the appellant, that of intent to defraud?*

The intent to deny guilt should have been clearly manifest to the District Court in view of the following statements made by the appellant:

> "Q: All right, sir. And how do you plead?
>
> A: Not guilty."
>
> Transcript, Page 8

> "Q: (by Mr. Laird, Asst. U. S. District Attorney) And you had spent a good many hours talking with the lawyer about the case before you entered that plea, hadn't you?

A: Yes, sir, and I was advised the morning before I came here that — I told my lawyer again I wasn't guilty."

Transcript, Page 28

"Q: (by Mr. Laird) Do you now say that you told this Court a falsehood at the time you entered your plea of guilty?

A: Yes, sir. May I say something else.

Q: Your counsel —

THE COURT: You may explain your answer, sure, go ahead.

A: I was advised that if I — I tried to tell my attorney I wasn't guilty, and he said — *he felt that I wasn't guilty of the crime, either*, and I was advised if I brought this up before the Judge that he wouldn't accept the plea of nolo contendere."

Transcript, Page 29

"THE DEFENDANT: . . . I told them I wanted to stay with the not guilty plea, and that I wasn't guilty of the crime, and my dad and my lawyer both told me to go ahead, . . ."

Transcript, Page 34

CONSTITUTIONAL BASIS

It is submitted that the right to have exercised in the determination of matters submitted to the discretion of a Court, *a sound judicial discretion*, is assured by the due process clause of the Fifth Amendment. Amendment V, Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

It is felt that this proposition is fundamental. Such discretion has been reviewed by certioriari many times, as in *Brady v. U.S.*, 90 S. Ct. 1463, 397 U.S. 742, 25 L. Ed. 2d 747.

STATEMENT OF THE CASE — SUMMARY

The appellant's Motion to Withdraw Plea of Nolo Contendre was filed December 4, 1970.

The aforesaid motion was presented to the District Court and denied on December 9, 1970.

The Judgment and Commitment was entered December 9, 1970.

Notice of Appeal was filed December 14, 1970.

In October, 1969, the appellant and his wife, his co-defendant in this prosecution, were travelling under the names of Danny and Antoinette Shantrell. The appellant,

age 20, had no trade except casual laborer. Antoinette, some fifteen years his senior, worked as a "go-go dancer."

Antoinette took a blank check from a Dr. Robert Shangrin, who had given them a ride in Texas a few days earlier. The doctor had given them bus tickets, which they had redeemed for cash. On their arrival in Oklahoma City, Oklahoma, October 28, 1969, they went to a local bank, the Capitol Hill State Bank and Trust Company, and deposited $50.00 cash and a check forged by Antoinette on Dr. Shangrin's Houston bank account in the amount of $1200.00. Danny has consistently maintained, while admitting that he endorsed the forged check, that he did not at that moment understand the nature of the transaction, and that Antoinette's explanation to him was that they would use the deposit slip they would secure from the bank to establish credit, so that they could give a post-dated check for an apartment, to be covered before its date by cash deposits. Note that the check was forged in Oklahoma City.

Directly on leaving the bank, they went to Brown's department store where Antoinette wrote a check on the new account to pay for a dress that cost some $70.00. Before the transaction was completed, and as soon as Danny learned that the dress cost more than the $50 cash they had deposited, he told the store clerk that the check would not clear, and asked the clerk to take back the dress and return the check to him. The store people called the police, and a detective and a uniformed officer

soon arrived to investigate the situation. Danny told the officers all about the $1200 check. They advised him that they would notify the bank to hold the check, and would arrange to have it reclaimed. Subsequently, during later portions of Danny's conversations with the officers, he was told that the bank had been notified to hold the check, and not to process it. The officers took Danny and Antoinette to jail, where they were booked on a minor city charge and bail set at $20. They were told that if their story was verified, and they were not wanted, they would not be charged further.

During March, 1970, at Denver, Colorado, the appellant had several interviews with an Agent Farmer of the Federal Bureau of Investigation concerning the $1200 check. Feltman has consistently related that Agent Farmer assured him that if he cooperated in the investigation and in the apprehension of his wife, and his story remained unimpeached, that he would either never be charged or would receive probation. He was released at Denver and did in fact locate Antoinette in Portland, Oregon, in August, 1970, and cause her apprehension by the authorities. In the meantime, a complaint had been filed at Oklahoma City before the United States Commissioner charging violation of 18 U.S.C. 2314, based on the $1200 check. The indictment was found September 11, 1970. Feltman was returned from Portland and remained in jail in Oklahoma City until posting an appeal bond in this matter.

At his arraignment October 29, 1970, the appellant appeared with court-appointed counsel and pled not guilty.

On November 18, 1970, Feltman again appeared before the District Court and entered a plea of nolo contendre.

On December 3, 1970, he employed present counsel, who, on December 4, 1970, filed his Motion to Withdraw Plea of Nolo Contendre. This motion was presented and denied December 9, 1970, and after a short recess to permit examination by the Court of the pre-sentence report, Feltman was sentenced to serve eighteen months imprisonment.

The record reflects neither formal nor informal discovery proceedings on the part of the defendant's court-appointed counsel, which it would seem would have been indispensable in the defense of this case, and even necessary to determine adequate advice as to a plea.

Appeal was perfected to the Court of Appeals, Tenth Circuit, with the proceedings and results hereinbefore set out.

BASIS FOR FEDERAL JURISDICTION

Basis for Federal Jurisdiction is established in that this matter arose as a federal prosecution for violation of 18 U.S.C. 2314.

REASON FOR ALLOWANCE OF WRIT

The appellant submits that certiori should be allowed in this case because:

1. The matters hereinbefore set out clearly submit a fundamental question of denial of due process as assured by the 5th Amendment, by abuse of judicial discretion.

2. The rule that "a presentence motion to withdraw a guilty plea should be freely allowed — should be uniformly followed, as pronounced in:

Second Circuit — *United States v. Rogers*, (1968, DC Conn.) 289 F. Supp. 726.

Third Circuit — *United States v. Stayton*, (1969, CA3 Pa) 408 F. 2d 559. *United States v. Boyance*, (1966, DC Pa.) 258 F. Supp. 935; *United States v. Fina*, (1968 DC Pa.) 289 F. Supp. 288.

Fifth Circuit — *United States v. Tivis*, (1969, DC Tex.) 302 F. Supp. 581, affd. (CA5) 421 F. 2d 147.

Ninth Circuit — *Kadwell v. United States*, (1963, CA9 Nev.) 315 F. 2d 667; *United States v. Thomas* (1969, CA9 Cal.) 415 F. 2d 1216.

Dist. Col. Circuit — *Poole v. United States*, (1957) 102 App. DC 71, 250 F. 2d 396; *Gearhart v. United States*, (1959) 106 App. DC 270, 272 F. 2d 499.

This rule is the best propounded to ensure fair administration of justice, and the conflict between circuits should be resolved by such determination by the Supreme Court.

3. The dicta in *North Carolina v. Alford*, 91 S. Ct. 160, wherein it is suggested that acceptance of a guilty plea accompanied by protests of innocence might be per-

missible, should be clarified and repudiated by the Supreme Court of the United States, as it would appear to dignify expressions made in judicial proceedings of lack of respect for the integrity of the Courts and of the administration of justice. Whatever the subjective consideration pragmatically appearing most prudent to a defendant may ever be; the Court should not dignify by their approval what amounts in the *Alford* circumstance to a judicial confession by a defendant couched in terms: "I am not guilty, but rather than submit myself to a system in which I have no confidence, I will plead guilty and submit myself to a lesser penalty than I might receive on trial."

In conclusion, appellant submits that within the four corners presented by his pleadings, testimony, and the argument of counsel in this cause, it was clearly manifest that he maintained throughout that his act lacked intent to defraud, and that he sought to abort the interstate transmission of the subject security before a federal offense would have been made.

Appellant submits that in its consideration thereof, the District Court should have followed the rule set out in *Gearhart v. U.S.*, 272 F. 2d 479 Syl. (4). "Where accused seeks to withdraw his plea of guilty before sentencing, on the ground that he has a defense to the charge, the District Court should not attempt to decide

the merits of the proffered defense, thus determining guilt or innocence of the defendant."

It appears to appellant that the Courts below and others which have taken a restrictive view of a defendant's request to withdraw a guilty or nolo contendre plea prior to sentencing have been much persuaded by the rationale that such motions impose upon the time and dignity of the court. In that connection the appellant notes and submits that perhaps up to this time the facilities of the U. S. District Court have been occupied with his cause for one hour's time, by his indecision. While appellant regrets this imposition, he would point out that the sentence imposed on him, while he continues to protest his innocence, while he has not had a trial, and asks nothing more than to have one, is of just 13, 290 times that duration. At these odds, we believe the Government could afford to indulge the appellant his day in Court; and such is his prayer for relief.

Respectfully submitted,

SIMON B. SPRADLIN
307 Mercantile Bldg.
Oklahoma City, Okla. 73102
Attorney for Appellant

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Cr. No. 70-216

Violation: 18 U.S.C. 2314

UNITED STATES OF AMERICA
Plaintiff

v.

DANIEL MICHAEL FELTMAN and
ANTOINETTE M. SHANTRELL
Defendants

INDICTMENT

The Grand Jury charges:

On or about the 28th day of October, 1969, at Oklahoma City, Oklahoma County, in the Western Judicial District of Oklahoma,

— — — DANIEL MICHAEL FELTMAN and
ANTOINETTE M. SHANTRELL — — —

did with unlawful and fraudulent intent cause to be transported in interstate commerce from Oklahoma City, Oklahoma to Houston, Texas a forged and falsely made security, to-wit, a check drawn on the Nassau Bay National Bank of Clear Lake, Houston, Texas, No. 125, dated October 22, 1969, payable to Danny Shantrell, in the amount of $1,200.00, signed Dr. Robert Shangrin,

knowing the same to have been forged and falsely made, in violation of Title 18, United States Code, Section 2314.

A TRUE BILL:

FOREMAN OF THE GRAND JURY

WILLIAM R. BURKETT
United States Attorney

JEFF R. LAIRD
First Assistant U. S. Attorney

Sept. 11, 1970

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CR. NO. 70-216

Violation: 18 USC 2314

UNITED STATES OF AMERICA
Plaintiff

v.

DANIEL MICHAEL FELTMAN and
ANTOINETTE M. SHANTRELL
Defendants

ORDER

This 9th day of December, 1970, this matter comes on in its regular order for hearing on the defendant's Motion to Withdraw Plea of Nolo Contendre. The United States of America appears by Jeff R. Laird, assistant

United States attorney, and the defendant appears in person and by his attorney, Simon B. Spradlin.

The Court, having examined the records and files herein, being fully advised in the premises, and having heard testimony taken in open court, finds:

That the motion should be denied, and IT IS SO ORDERED.

LUTHER B. EUBANKS
United States District Judge.

JUDGMENT AND COMMITMENT (Rev. 2-68) Cr. Form No. 25a

United States District Court

FILED Dec. 9, 1970
Rex B. Hawks, Clerk

FOR THE
WESTERN DISTRICT OF OKLAHOMA

By /s/ Zeta M. Cowan
Deputy

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United States of America

v.

D. JOY MICHAEL FELTMAN

No. 70-216-Criminal

On this 9th day of December, 19 70 came the attorney for the government and the defendant appeared in person and by his attorney, Simon B. Spradlin, Esq.

It Is Adjudged that the defeddant upon his plea of nolo contendere and a finding of guilty by the Court

has been convicted of the offense of violation of Title 18, U.S.C., Section 2314 (Interstate transportation of a forged and falsely made security), as charged in the one count of the indictment,

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eighteen (18) months on the one count of the indictment, or until the defendant is otherwise discharged as provided by law.

It Is Adjudged that the defendant be remanded to the custody of the U. S. Marshal.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Luther B. Eubanks
Luther B. Eubanks,
United States District Judge.

The Court recommends commitment to

Rex B. Hawks, Clerk
By /s/ Zeta M. Cowan
Deputy Clerk.

A True Copy. Certified this 9th day of December, 1970

(Signed) Rex B. Hawks, (By) Zeta M. Cowan
Clerk. Deputy Clerk.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 71-1048

September Term, 1971

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

DANNY MICHAEL FELTMAN and
ANTOINETTE FELTMAN
Defendants-Appellant

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA
(D.C. Cr. No. 70-216)

Simon B. Spradlin for defendant-appellant.

Jeff R. Laird, First Assistant U.S. Atty., (William R. Burkett, U.S. Atty., on the brief) for plaintiff-appellee.

Before PHILLIPS, HOLLOWAY and DOYLE, Circuit Judges.

PHILLIPS, Circuit Judge.

Feltman and his wife, Antoinette Feltman, were jointly charged by indictment with causing to be transported in interstate commerce a forged and false security, knowing the same to have been forged and falsely made in violation of 18 U.S.C. § 2314 (paragraph 3).

On October 29, 1970, Feltman appeared for arraignment with his court-appointed lawyer, Charles D. Crandall, and entered a plea of not guilty. Antoinette first

entered a plea of not guilty. Later, on November 18, 1970, she changed her plea to nolo contendere, and on December 9, 1970, was sentenced to three years' imprisonment, but execution of the sentence was suspended and she was placed on probation.

On November 18, 1970, Feltman appeared in open court with his court-appointed lawyer, and with the court's consent withdrew his plea of not guilty and entered a plea of nolo contendere.

Before the plea of nolo contendere was entered, Feltman assured the court he understood the charge and the penalty, understood that the plea of nolo contendere would be treated by the court in the criminal proceeding the same as a plea of guilty and that the penalty would be the same; that he had received no promises, inducements, mistreatment, or coercion, and that he was satisfied with his court-appointed lawyer. Feltman further stated to the court that he committed the offense with which he was charged.

On December 4, 1970, Feltman filed a motion to withdraw his plea of nolo contendere. As grounds for the motion he set up:

1. That he did not in fact believe he was guilty of the offense charged; and

2. That his previous plea of nolo contendere was induced by the expectation that he would receive leniency from the court when it imposed sentence upon him.

The court accorded Feltman a full and fair hearing on his motion. On December 3, 1970, Feltman had employed Simon B. Spradlin as counsel. Spradlin prepared the motion, represented Feltman at the hearing thereon, and represents him on this appeal.

In March 1970, Feltman was being held in jail in Denver, Colorado, on a parole violation charge. He testified that while he was so incarcerated, on March 27 or 28, 1970, he had two conversations with one Farmer, an F.B.I. Agent for the District of Denver, who was investigating the transportation of the forged check charge; that Farmer took a statement from him the first day he came to see him; that Farmer told him he would call Oklahoma City and check the information Feltman had given him, and that he would then come to see Feltman again; that on the next day Farmer came to see him and told him the investigation had to do with the offense of interstate transportation of a forged security; that they were looking for Antoinette and if he would cooperate with them and help them find Antoinette, no charge would be brought against him for such offense, and if it was, "my cooperation ° ° ° would help me." He further testified that he did not feel he was guilty of

transporting in interstate commerce a forged check, and that following the second conversation he was released.

After the direct and cross-examination at the hearing were completed, the court asked Feltman a number of questions with respect to the answers he made to questions propounded to him by the court when he was permitted to enter his plea of nolo contendere, and particularly, when asked by the court, "° ° ° did you commit the offense with which you are charged; that is, did you, along with your wife, cause this $1200 check, which was forged, to be transported in interstate commerce ° ° °?" He answered, "Yes, sir, I did." The court further asked Feltman how he came to make that statement then, and now denied he committed the crime. Feltman answered, "° ° ° actually, I did commit the crime."

The record clearly shows that Feltman's statements, made to the court when he entered a plea of nolo contendere, were directly contradictory to what he testified to at his motion to withdraw such plea.

In its opinion in Dorton v. United States, decided August 13, 1971; 10 Cir., ___ F. 2d ___, at ___, this court stated:

> "There is no absolute right to withdraw a plea of guilty, even before the imposition of sentence, and whether such a withdrawal shall be permitted rests within the sound discretion of the court. But an application to withdraw a plea of guilty, made before imposition of sentence, will be considered carefully

and with more liberality in favor of the accused than when such an application comes after the imposition of sentence.

> " 'This does not mean that every motion for withdrawal before sentence should be granted. There is no absolute right to withdraw a plea, and the right to do so is within the sound discretion of the trial court.' " (See cases cited in notes 5, 6 and 7 thereto.)

After the denial of the motion to withdraw his plea of nolo contendere, the court sentenced Feltman on the plea of nolo contendere to 18 months in the custody of the Attorney General.

After carefully examining the arraignment proceedings, the proceedings when the plea of nolo contendere was permitted to be entered, and the proceedings on the motion to withdraw the plea of nolo contendere, we are fully convinced that the court did not abuse its discretion in denying the motion.

AFFIRMED.

NOVEMBER TERM — DECEMBER 1, 1971

Before Honorable Orie L. Phillips, Honorable William J. Holloway, Jr. and Honorable William E. Doyle, Circuit Judges

No. 71-1048

UNITED STATES OF AMERICA
Appellee

v.

DANNY MICHAEL FELTMAN
Appellant

and

ANTOINETTE FELTMAN
Defendant

This matter comes on for consideration of Appellant's Petition for Rehearing in the captioned case.

Upon consideration whereof, the Petition for Rehearing is denied.

HOWARD K. PHILLIPS
Clerk

NOVEMBER TERM — DECEMBER 13, 1971

Before Honorable Orie L. Phillips, Honorable William J. Holloway, Jr., and Honorable William E. Doyle, Circuit Judges.

No. 71-1048

UNITED STATES OF AMERICA
Appellee

v.

DANNY MICHAEL FELTMAN
Appellant

Upon consideration of appellant's motion for stay of mandate, it is ordered that issuance of the mandate is stayed to and including December 31, 1971, pending certiorari, and if during that time the appellant files a petition for writ of certiorari with the Clerk of the United States Supreme Court, the stay shall continue until final disposition by that Court.

LIBRARY
SUPREME COURT, U. S.

No: 71-874

In the Supreme Court of the United States

OCTOBER TERM, 1971

DANIEL MICHAEL FELTMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-874

DANIEL MICHAEL FELTMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted on the basis of his plea of nolo contendere of causing a forged and false security to be transported in interstate commerce, knowing it to have been forged and falsely made, in violation of 18 U.S.C. 2314. He was sentenced to eighteen months' imprisonment. The court of appeals affirmed (see Pet. App. 19-23).

In October 1969, petitioner and his wife, who were traveling under the names Danny and Antoinette

Shantrell, were hitchhiking in the area of Houston, Texas. The couple had been given a ride by a Dr. Shangrin. Dr. Shangrin bought the couple bus tickets for a trip to Denver, Colorado. When the doctor left the car to cash a check to buy the tickets, a blank check was stolen out of the glove compartment. The couple later redeemed the bus tickets for cash. Later, after arriving in Oklahoma City, Antoinette filled out the blank check to the order of Danny Shantrell in the amount of $1,200 and after the check was endorsed by petitioner, it was deposited along with the fifty dollars cash in an Oklahoma City bank. They planned to use the deposit slip received from the bank as a means of establishing credit so as to enable them to obtain an apartment (Tr. 54-55).[1]

On October 29, 1970, petitioner and Antoinette entered pleas of not guilty. On November 18, 1970, the day prior to trial, Antoinette changed her plea to nolo contendere. Petitioner appeared with counsel and, with the court's consent, also withdrew his plea of not guilty and entered a plea of nolo contendere. Petitioner assured the judge that he understood the nature of the charge and the penalty, that the plea of nolo contendere would be treated by the court as if it was a plea of guilty, and that he had received no promises, inducement, mistreatment or coercion to enter the plea. Petitioner affirmed that he had in fact committed the crime with which he was charged (Tr. 12-15).

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[1] "Tr." refers to the transcript of the various proceedings before the district court.

On December 4, 1970, prior to sentencing, petitioner filed a motion to withdraw his plea of nolo contendere. As grounds he claimed that he did not in fact believe that he was guilty and that his plea had been induced by an expectation that he would receive leniency from the court when it imposed sentence. On December 9, 1970, a hearing was held on the motion. Petitioner stated that his expectation of leniency was based on a March 1970 interview with an F.B.I. agent while petitioner was in a Denver jail for a parole violation. Petitioner stated that he had been told by the agent that if he helped them find Antoinette, no charges would be brought against him or, if charges were filed, his cooperation with the authorities would help him (Tr. 25, 30). The court then asked petitioner why he had admitted committing the crime at the time his plea of nolo contendere was entered. Petitioner answered, "* * * actually, I did commit the crime" (Tr. 33-34). When asked why he now thought the court would not be lenient in sentencing, petitioner replied: "Due to my prior record" (Tr. 35). The court then inquired whether petitioner's record was then the same as it had been at the time the plea was entered and petitioner said that it was. The government stated that it would make a full disclosure in the pre-sentence report as to the nature and extent of petitioner's cooperation with the authorities (Tr. 41-42).

In denying the motion for withdrawal of the plea, the judge relied on the fact that petitioner had on two occasions admitted before the court that he had committed the crime charged. The judge also found

that petitioner's plea had been voluntary (Tr. 47-49). Petitioner was then sentenced to eighteen months' imprisonment (Tr. 60-62).[2] The court of appeals affirmed (Pet. App. 19-23).

Petitioner argues that the trial judge erred in denying his motion to withdraw his plea of nolo contendere under Rule 32(d) Fed.R.Crim.P.,[3] relying on several court of appeals cases holding that such motion, when made prior to sentencing, should be "freely granted." But no case suggests that there is an absolute right to withdraw a plea prior to sentencing under Rule 32(d). See, *e.g.*, *United States ex rel. Scott* v. *Mancusi*, 429 F. 2d 104 (C.A. 2), certiorari denied, 402 U.S. 909; *United States* v. *McDaniel*, 425 F. 2d 813 (C.A. 5). As stated in *Everett* v. *United States*, 336 F. 2d 979, 983 (Burger, J.) (C.A. D.C.):

> * * * [O]ur use of the language 'freely allowed' plainly implies the existence of some circumstances in which a defendant is *not* entitled to withdraw a plea of guilty before sentencing, and negates any absolute right to do so. Overwhelming authority holds, as has this Court, that withdrawal of a guilty plea before sentencing is not an absolute right but a decision within the sound discretion of the trial court which will be re-

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[2] The judge noted that petitioner's cooperation had been mentioned in the pre-sentence report but deemed a prison sentence appropriate in light of petitioner's extensive prior criminal record.

[3] Petitioner does not claim that he was the victim of unkept promises made by the government as a part of the plea bargaining process. Compare *Santobello* v. *New York*, No. 70-98, this Term, decided December 20, 1971.

versed by an appellate court only for an abuse of that discretion.

In the instant case there was no abuse of discretion on the part of the trial judge in denying the motion to withdraw the plea in view of the fact that on two occasions petitioner had admitted committing the charged offense and there was no basis for belief that the plea had not been voluntarily made.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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